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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 482

VALENTINE BROADWAY BOWERS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 334-337) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 16, 1949 (R. 337). The petition for a writ of certiorari was filed on December 14, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether the trial court's supplemental charge to the jury, after they had first reported inability to agree on a verdict and later returned with questions as to what constitutes a contract, was prejudicially erroneous as being argumentative and one-sided.

STATUTE INVOLVED

Section 215 of the Criminal Code, 18 U.S.C. [1946 ed.] 338, provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be

fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

Petitioner was indicted in seven counts for using the mails to defraud, in violation of Section 215 of the Criminal Code, 18 U.S.C. [1946 ed.] 338 (R. 1-7). He was found guilty on counts 4, 5 and 7 and the jury was unable to agree on a verdict on the remaining counts (R. 10). After verdict, his motion in arrest of judgment as to count 7 was sustained on the ground that the statute of limitations had run against the offense charged therein (R. 10, 15). He was sentenced to five years' imprisonment on each of counts 4 and 5, to run concurrently (R. 14). The Court of Appeals affirmed the conviction (R. 337.)

The evidence as to counts 4 and 5, summarized below, illustrates both the nature of the scheme to defraud and the means used by petitioner in its execution:

After answering petitioner's advertisement in the Cleveland *Plain Dealer* for an associate manager in an automobile business in Fort Lauderdale, Florida, Jay MacLaren received a letter dated April 15, 1946, signed "Coastal Motors, Inc., by V. B. Bowers, Jr.,"[1] asking him to call in regard to the position (R. 91-92). In answer to MacLaren's phone call, petitioner arranged a meeting

[1] Petitioner's subsequent letters of May 5 (R. 95) and May 21, 1946 (R. 98-99), were signed "Coastal Motors, by V. B. Bowers, Jr."

at Jacksonville, where he informed MacLaren that he owned two service stations at Fort Lauderdale, as well as used car and rental car businesses. Petitioner proposed a $5,000 escrow deposit (later reduced to $3,000; R. 108-109) by MacLaren. (R. 93.) At Fort Lauderdale, petitioner took MacLaren for a drive, and pointed out as his properties two filling stations and a used car lot known as Island Motors. When MacLaren expressed his satisfaction with the set-up, petitioner requested a $1,000 check immediately, but MacLaren wanted to wait until his return to Cleveland and insisted upon a contract first. In Cleveland, MacLaren received a letter dated May 5 together with a contract from petitioner. (R. 94-95.) In a letter dated May 9, MacLaren forwarded to petitioner a check for $1,000 payable to Coastal Motors as the initial payment on a total of $3,000, in accordance with the terms of the signed contract enclosed with his letter. Under the terms of the one-year contract, petitioner was to pay MacLaren $75 per week for his services in the business, and at the end of the year MacLaren was to have the option of purchasing a one-half interest in the business. (R. 96-98.) In a letter dated May 21, petitioner requested that MacLaren have copies of the contract made on legal size stationery, sign the original, and return it for his signature. MacLaren complied with this request in his letter of May 23. (R. 98-100.) MacLaren received no reply until petitioner's letter of June 6, stating that his contem-

plated trip North had been delayed and that he would bring the contract when he arrived to talk to MacLaren. Meanwhile, MacLaren had given up his job and sold his furniture, and he became desperate when petitioner did not come to see him. (R. 100-102.) After sending an urgent letter dated July 22, 1946, MacLaren received a phone call from petitioner telling him to come to Fort Lauderdale (R. 102). Upon his arrival, MacLaren found that there were no longer two service stations as specified in the original agreement, but only a used car lot with separate telephones for Coastal Motors and Island Motors. Petitioner told MacLaren that he was also distributing motor scooters as part of the business of Coastal Motors. (R. 105.) After resisting petitioner's efforts to obtain the additional $2,000 from him, MacLaren learned from Darwin York that they had both answered the same ad, had talked to petitioner in Jacksonville on the same day, and had similar contracts for a one-half interest in the business. MacLaren then insisted upon the return of his $1,000, which petitioner gave him together with $75 for one week's salary. (R. 106-107, 114-115.)

York also responded to an advertisement in the Cleveland *Plain Dealer* and later went from Warren, Ohio, to Jacksonville to discuss petitioner's proposition. Petitioner informed York that he would share in the profits from several businesses, including used cars, used parts, the Pompano Taxi Company, and two gasoline stations. (R. 119-120.)

After petitioner showed York his purported business properties in Fort Lauderdale (R. 120-121), York decided that he wanted a 50 per cent interest in the business for which he was to pay $5,000 (R. 122). After York returned to his home, petitioner mailed him a letter dated May 21, 1946, enclosing a copy of the contract and asking him to have it typed on legal size paper and mail it to petitioner (R. 123-124). In a letter of June 6, petitioner informed York he had changed his plans in regard to keeping the gasoline stations and said he would arrange to meet York in Cleveland. He did not do so. (R. 127-128.) On July 16, after selling his home, York went to Fort Lauderdale. He turned over to petitioner a total of $5,800, $300 of which was for rent for a home petitioner obtained for him (R. 125-126) and $5,500 of which petitioner used to pay W. G. Ford for Island Motors (R. 137). York did not recover any of the funds he gave petitioner, nor was he paid any salary (R. 130). Later petitioner gave York a non-negotiable note for $5,500 which York reduced to judgment but was unable to collect (R. 131-132). In other essentially similar transactions, petitioner obtained substantial amounts from six other victims (see R. 336).

The other facts relating to the question presented are set out in the Argument.

ARGUMENT

In his main charge to the jury, the trial judge gave the usual instructions on the presumption of

innocence, the burden of proof, and the "duty and obligation" of the jury as the "sole triers of the fact." In this connection, he admonished that "Any comments which I may make upon the evidence are expressions of my own opinion, and are only made in the effort to assist you in arriving at a true verdict." (R. 298-299.) He then read the pertinent part of the statute, summarized the allegations of the indictment, and explained the elements of the offense (R. 299-302). He observed that there seemed to be "little doubt that in each instance, the mails were used in connection with the plan which the defendant had" and that it therefore seemed to him "that there is only one issue for you to determine, and that is the issue of whether or not this defendant had devised a plan or scheme to defraud" (R. 302-303). He emphasized that intent to defraud was an essential element of the offense and explained that in determining whether petitioner had such intent the jury must consider what he said and did and "all the circumstances attending these various transactions" (R. 304). The jury were also instructed, however, that evidence concerning petitioner's transactions with government witnesses Clark and Laki, who were not named as victims in the indictment (see R. 1), and evidence that he had previously been convicted of mail fraud [2] could be considered only on the issue of intent (R. 303, 304). In addition, the

[2] This fact was brought out on cross-examination of petitioner, without objection (R. 277).

jury were told that they should consider on the issue of intent the evidence that petitioner made refunds to some of the witnesses, but that his actions in this regard would not exculpate him if he had in fact devised a scheme to defraud and used the mails in its execution (R. 303-304). Finally, the judge adverted to petitioner's defense that "his plans were honest, business transactions" and told the jury that if they believed him they should find him not guilty (R. 305). Beyond these references to the evidence, the judge did not, as he himself observed at the conclusion of his charge (*ibid.*), undertake a comprehensive review of the trial.

After the jury had deliberated awhile, they reported that they were unable to agree on a verdict on any of the counts, but they desired no further instructions.[3] The trial judge, as was proper (see *Allen* v. *United States,* 164 U.S. 492, 501), and without objection, urged them to try again to reach a verdict on one or more counts. (R. 306-309.)

The incident of which petitioner complains occurred later, when the jury returned to ask whether "a letter quoting terms as a contract would be considered a contract" (R. 309-310). After some colloquy between the judge and the jury as to the elements of a contract (R. 310-312), the judge

[3] It does not appear how long the jury had deliberated before they reported disagreement or how much time elapsed before they again returned to the courtroom for further instructions, as related in the text. The record shows, however, that the testimony was concluded at 11:10 a.m. and the verdict returned at 7:15 p.m. (R. 297, 317).

gave a supplemental instruction obviously calculated to clarify their thinking and focus their attention on the only issue developed by the evidence—the issue of petitioner's intent. He first adverted to petitioner's testimony that "these were legitimate transactions and legitimately entered into, open and above board," and said that if the jury believed petitioner, or if his testimony left a reasonable doubt in their minds, they should acquit him. (R. 312.)[4] He reiterated at the close of this instruction that the real issue was whether petitioner's "representations to these people were honest. And if they were, even if they were rosy, that is one thing, and it is quite another thing if it was his purpose to defraud these people" (R. 314). The judge also commented briefly on the evidence adduced by the Government, pointing out that over a period of approximately two years, petitioner "took in as partners or associates, or whatever you might call them," the six people named in the indictment and three others, that all of these people "put up money," that some of them got back all or part of their "cash investment," while others received nothing, and that none of them received any profit or was "made whole, if you count their time and expenses and quitting their jobs,

[4] The only witness for the defense, in addition to petitioner, was one Hertel, who testified that he had heard government witness Laki tell petitioner in the corridor of the courthouse, before Laki took the stand, that he would leave the courthouse if petitioner would give him back his money, and that petitioner replied that Laki would not "get a cent" (R. 206-208).

and selling their homes and moving down here." The jury were told that they should "consider those things" and the fact that "nearly all of these transactions followed the same pattern." The judge also referred to petitioner's prior conviction and repeated that the jury could consider this fact as bearing on his credibility and "what his motives and intentions were in these transactions."[5] (R. 313.) Finally, after telling the jury, in response to a question, that each count was "separate" and that it was within their province to convict or acquit on all or some of the counts, the judge repeated in substance his earlier instruction respecting the evidence of petitioner's repayments to some of the government witnesses (R. 314). Although defense counsel excepted to some parts of this supplemental charge, there was no objection, as there is now, that it was "argumentative and one-sided" (Pet. 16).

It is settled, of course, that a federal trial judge may draw attention to and comment on the evidence which he deems important, and even express his opinion on the facts, so long as he does not by command or other coercion infringe upon the jury's province to determine them. See *Simmons* v. *United States,* 142 U.S. 148, 155; *Horning* v. *District of Columbia,* 254 U.S. 135, 138, 139; *Quercia* v. *United States,* 289 U.S. 466, 469; *United States* v. *Murdock,* 290 U.S. 389, 394; *United States* v. *Goldstein,* 120

[5] This instruction was a correct statement of the law. *King* v. *United States,* 144 F. 2d 729, 732-733 (C.A. 8), certiorari denied, 324 U.S. 854; *Weiss* v. *United States,* 122 F. 2d 675, 687 (C.A. 5), certiorari denied, 314 U.S. 687.

F. 2d 485, 491 (C.A. 2), affirmed, 316 U.S. 114. There was no such infringement here. The trial judge's review and comments on the evidence appear appropriate in the particular circumstances of this case. As we have shown, he expressly refrained from reviewing the evidence in his main charge. But when the jury returned the second time to ask for instructions on the law of contracts, it became apparent to him, as it is to us from a reading of the record, that they were being delayed in reaching a verdict by consideration of irrelevant matters.[6] Accordingly, he undertook to define again for them the crucial issue of petitioner's intent and to focus their attention on the significant items of evidence they should consider in resolving that question. In doing so, he summarized briefly the evidence on both sides. While his summary of the Government's evidence was longer than his statement of petitioner's defense, this can be explained by the nature and extent of the proof adduced to show fraudulent intent. The judge was not required to mention all the items of evidence, either for the prosecution or the defense, especially since he had cautioned the jury in his main charge that his comments on the evidence were only intended to assist them, that they were the sole triers

[6] Toward the end of his supplemental instructions, the judge adverted to the jury's questions about contract law and properly charged them that "legal questions about a contract [have no] great bearing in this case. A question of not whether or not the man entered into a legal contract—it may be that it was a legal contract; maybe it was dated as of a certain date—the question is, his motive." (R. 313-314.)

of the facts, and that they were to consider all the circumstances in determining petitioner's intent. *Allis* v. *United States,* 155 U.S. 117, 123-124.

Nor was the supplemental charge argumentative. As the judge pointed out, the evidence concerning petitioner's dealings with the government witnesses was largely uncontradicted. And this review of the evidence does not appear to be "one-sided." The judge's references to the similarity of the transactions with the various government witnesses, and to the fact that they derived no profits from their partnerships with petitioner, do not involve error. A trial judge may fairly point out to the jury the rational implications of the evidence (*United States* v. *Frankel,* 65 F. 2d 285, 288 (C.A. 2), certiorari denied, 290 U.S. 682), especially where, as here, intent is the crucial issue.

CONCLUSION

The judgment below is correct and there is no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1950.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1950 871147 494